Supreme Court of the United States

OCTOBER TERM, 1918

No. 937

FREDERICK J. MACLEOD and EVERETT E. STONE,
CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR PETITIONERS

HENRY C. ATTWILL
Attorney General for the Commonwealth

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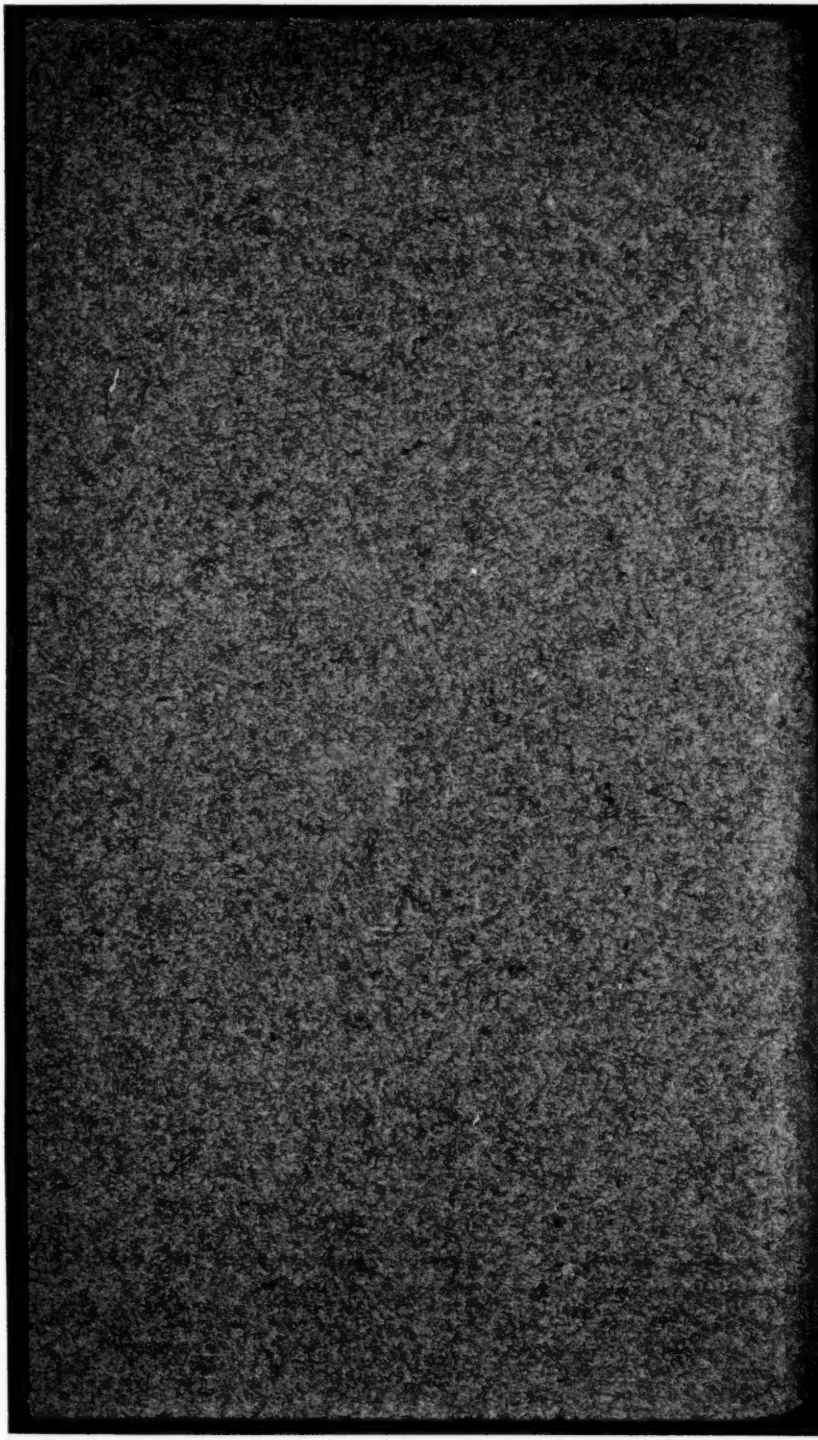

Supreme Court of the United States

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SUBJECT INDEX.

LIST OF CASES CITED.

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v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

BRIEF FOR PETITIONERS.

NATURE OF CASE.

This is a petition to review by certiorari a decree of the Supreme Judicial Court of Massachusetts dismissing a statutory petition (St. 1913, c. 784, §28, Appendix, p. 43) brought by the Public Service Commission of that State against the respondent to compel it to obey an order of the Commission relating to certain intrastate telephone toll rates entered January 31, 1918. That order directed the respondent to cancel rates put in effect on January 21, 1919, at

the direction of the Postmaster-General, and to restore the schedule of rates previously in effect. (Record, p. 9.)

A preliminary order granting the writ of certiorari was entered by this court on April 21, 1919, and the case then advanced for argument and assigned for hearing on May 5, 1919. By stipulation of the parties, the transcript of the record upon the petition for the unit is to be taken as the return thereto.

In the state court the case was heard upon the allegations of the petition and the answer. In accordance with the local practice the case was there considered "upon the footing that the averments of the answer are true where in conflict with those of the bill and that the allegations of the bill are true only so far as admitted or not at variance with the facts well pleaded in the answer." (Record, p. 26.) Among other defenses the respondent pleaded (Record, p. 19, par. 11, 12) that, by virtue of the existence of Federal control of its telephone system exercised under the Joint Resolution of Congress of July 16, 1918, the proclamation of the President of July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was a necessary party, and that the suit was in substance and effect one against the United States. The court sustained this plea and entered a decree dismissing the suit as not within its jurisdiction on both of these grounds. (Record, p. 25.) No other questions involved in the case were considered by it.

FACTS INVOLVED.

On July 16, 1918, Congress adopted a resolution (see Appendix, p. 44) authorizing the President to take possession and assume control of all telephone and telegraph systems and properties and to operate the same for the duration of the war, such possession and operation not to extend "beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace." That resolution contained the following proviso: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

By a proclamation dated July 22, 1918, (Record, p. 20) the President, by virtue of the powers vested in him by this resolution, and of all other powers enabling such action, took possession and assumed "control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies." The proclamation provided that such possession and control should be assumed from and after twelve o'clock midnight on July 31, 1918. The proclamation then provided: —

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General, Albert S. Burleson. Said Postmaster-General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster-General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August 1, 1918, the Postmaster-General issued an order (Record, p. 22) announcing that he had "assumed possession, control and supervision of the telegraph and telephone systems of the United States," and directed —

"Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to

leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public."

Possession and control of the system of the respondent was assumed in accordance with the terms of this proclamation and order. Since August 1, 1918, that system has been operated by the respondent and its officers and employees solely in accordance therewith. The respondent has entered into a contract with the Postmaster-General determining the amount of compensation that it is to receive from the Government of the United States for the use of its properties. The amount thus determined is not in any way affected by the receipts from the public on account of the operation of its system.

On December 13, 1918, the Postmaster-General issued an order providing that on and after January 21, 1919, the rates for toll service over all the telephone lines and systems under his control, and including the lines and systems of the respondent, should be computed and charged according to a standard schedule set forth in the order. (Record, p. 16.) Notice of this schedule having been given by the respondent to the Public Service Commission, it held a hearing thereon, and, on January 31, 1919, entered an order directing the respondent "to cancel forthwith the rates and charges stated in" the proposed new schedules, "which rates and charges have been found by the Commission to be unjust and unreasonable." It further ordered the respondent "to put in force and effect forthwith, and hereafter maintain within the Commonwealth of Massachusetts, the rates and charges

for telephone toll service which were in effect prior to January 21, 1919, . . . which rates and charges have been found by the Commission to be just and reasonable." (Record, pp. 8, 17.) The new schedule of rates, involving intrastate toll rates, was put in effect by the respondent on January 21, 1919. It was not cancelled pursuant to this order and still remains in effect. (Record, p. 18.) On February 1, 1919, the present suit to enforce this order was filed. (Record, p. 3.)

QUESTIONS AT ISSUE.

The petitioners contend: —

I. The respondent, through its officers and employees, is now operating the telephone system owned by it as an instrumentality of the Federal government. Therefore, it is a proper party against which a valid order of the Public Service Commission of Massachusetts, relating to intrastate rates in that state, may be directed. Accordingly, it may be required by the Massachusetts Supreme Judicial Court in the exercise of its statutory jurisdiction to obey such an order.

II. The Joint Resolution of July 16, 1918, expressly reserved to the states the right to regulate telephone rates during government control to the same extent as that right existed prior to such control. Therefore, the Commonwealth of Massachusetts had full jurisdiction over the regulation of intrastate telephone rates after and notwithstanding action by the President under the Joint Resolution of July 16, 1918.

III. In view of the provisions of the Joint Resolution of Congress, neither the United States nor the President nor the Postmaster-General was a necessary

party to a suit to enforce an order of the Public Service Commission, directed to the respondent, relating to such rates. Such a suit was not, in substance or effect, one against the United States. It was within the jurisdiction of the state court to restrain the respondent from exceeding the authority granted to it by that Resolution.

IV. The question whether the Public Service Act of Massachusetts is to be interpreted as applying to the respondent, when acting as an instrumentality of the Federal government, is one primarily for the determination of the state court when its jurisdiction has been established. If this court can, and is willing, to deal with it at this stage of these proceedings, it is submitted that it must construe this statute as applicable to the respondent under existing conditions.

ARGUMENT.

I.

The Respondent through its Officers and Employees is now operating the Telephone System owned by it as an Instrumentality of the Federal Government.

Prior to midnight July 31, 1918, the respondent was admittedly engaged in operating its telephone system as a public service corporation for the financial benefit of its stockholders. At that time, by virtue of a proclamation dated July 22, 1918, possession and control of all its properties was assumed by the President. It does not appear that any act with reference to these properties, other than the issuing of this proclamation, was performed by or in behalf of the President.

By the proclamation he directed "that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General." (Record, p. 21.) He also authorized him to perform the duties imposed upon him "through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems." He directed that, until the Postmaster-General shall order otherwise, "the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be." (Record, p. 21.)

On August first, the Postmaster-General, in announcing that he had taken possession and control of these systems, issued a general order in which he declared that "until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. . . . All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment." (Record, p. 23.)

So far as the public was concerned, there was no break or change in the operation and apparent control of the system of the respondent. Its business has been continued in precisely the same general manner as before, in the name of the respondent and through

the acts of its officers and employees. In fact, there appears at no time to have been any actual change in the physical possession of its properties. That has always remained in the corporation. There was nothing which amounted to a seizure by any representative of the United States. All that occurred was that the President formally assumed control of the property and the business of the respondent and entrusted that control to the Postmaster-General. The latter in turn directed that "the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels."

In other words, what was done, both in Massachusetts and throughout the country, was merely to assume control of the companies and through them of the properties, business and employees. The companies were required thereafter to operate in the interest of the Federal government and subject to the orders of the Postmaster-General. In fact, the government took possession of these systems merely by making the corporations owning and operating them its agents. Their possession continued as before, but, on and after August first, that possession was in behalf of the government as its agents.

This is expressly conceded by Mr. Lamar, Solicitor of the Post Office Department, and one of the committee appointed by the Postmaster-General for the Government operation of the telephone systems. In a letter dated January 15, 1919, addressed to one of the petitioners, (See Bill of Complaint, Exhibit B, Appendix C (Record, p. 11,)), he uses this expression, "the New England Company, which, as you are aware, is now and ever since August 1, 1918, *has been operating its*

properties for the account of the Government and not for the benefit of its stockholders." This statement of the legal advisor of the Postmaster-General is utterly inconsistent with any theory that the respondent corporate entity is not still actually operating its system through its officers and employees.

It is obvious that there were no other practical means by which the problem could be handled without serious interruption in the business of these companies. Vast bodies of officers and employees could not be transferred from the service of these companies to the direct service of the United States without their consent. They must continue to be officers and employees of these corporations as before and subject to the direction of their superiors in the service of the corporations. Only in this way could these huge systems be taken over as complete going concerns. The directors, officers and employees of each of these companies stood in no relation whatever to each other except through their mutual relationships to the corporation. To destroy those relationships and to attempt to force upon these employees a direct relationship to the Federal government would have meant a complete disruption of these systems.

Thus the only thing that happened on August first was that the telephone companies ceased to be independent corporations, conducting their own systems for their own financial benefit, and thereafter, though still having the legal title to and the actual possession of their properties, became instrumentalities of the Federal government, exercising their corporate functions, holding and operating their properties and controlling their officers and employees solely as such instrumentalities.

They now are subject to the direction of the President and the Postmaster-General and conduct their systems for the financial benefit of the government. They are paid by the government for the use of their properties and for their services in operating them for the government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the Joint Resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed. It is the respondent, through its corporate machinery, that has established and is charging in Massachusetts these new rates. To be sure, it is doing so at the order of the Postmaster-General and not in the exercise of any independent judgment on the part of its officers, but it is doing so by the exercise of its corporate powers and through its control over its employees. It would not be possible for the Public Service Commission to choose any officer or employee of the respondent against whom it might direct its order with any assurance that it was within his power to cause it to be obeyed. Any injunction against the respondent, however, binds all its officers and employees and requires them to exercise the powers of the corporation to bring about obedience to it.

Doubtless, the respondent may find itself in a position where it will be required to choose between obeying a decree of this court and carrying out an illegal order of the Postmaster-General. An alternative of that character, however, is always possible when a superior officer, public or otherwise, seeks to require a subordinate to perform an illegal act. In the case at

bar, it cannot be assumed that, when that illegality has been demonstrated, the Postmaster-General will continue to insist upon his order. Even if that should occur, it would not in any way excuse this respondent from the consequences of its illegal act.

II.

Jurisdiction of Massachusetts over the Regulation of Intrastate Telephone Rates, after Action by the President under Joint Resolution of July 16, 1918, reserved to it by that Resolution.

There can be no question as to the power of the Commonwealth to regulate, within constitutional limitations, the rates to be charged by telephone companies for service rendered by them within the State. Such companies are conducting a business charged with a public interest which is as much subject to such regulation as is the business of a railroad.

> Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, 372.
> Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14.

Resolution within War Powers.

Admittedly, the Joint Resolution of Congress under which the President took control of these systems and properties was passed under the war powers of Congress. Unquestionably those powers must be given the widest scope required by the emergency which called them into action. We raise no question but that Congress had the power to authorize, or even to

require, the taking over of the telegraph and telephone systems of the country by the Federal government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of Federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers.

Possible Limitations.

Obviously, Congress could not authorize the taking of these systems by the Federal government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a state as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *à fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the

admitted purpose of the establishment of the rates in question. (Record, p. 11.) Such action seems to go beyond the scope even of the far-reaching war powers.

Limitations recognized.

However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the states should be interfered with as little as possible. The resolution as originally drafted, and finally enacted, contained this express reservation to the states: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This is an express enactment that action by the President under the resolution shall not "amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States," except to the extent that such regulations may affect the transmission of government messages or the issue of stocks and bonds by the companies whose properties have been taken.

Question One only of Construction.

The question now before the court turns entirely upon the interpretation to be given this proviso. Did Congress intend by it to reserve to the states the right to enforce existing statutory regulations for the de-

termination of telegraph and telephone rates? If so, the only question that remains concerns the manner in which this reserved power shall be exercised.

"Lawful police regulations" can only mean regulations established in the lawful exercise of the police power. **"Police Regulations" defined.**

Chicago, Burlington & Quincy R.R. *v.* Illinois, 200 U. S. 56.

Railroad Co. *v.* Fuller, 84 U. S. 560, 568.

That power is not restricted as to the regulation of matters connected with the public health, safety or morals, but extends to everything which concerns the public convenience and the general welfare.

Sligh *v.* Kirkwood, 237 U. S. 52, 59.

German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.

Eubank *v.* Richmond, 226 U. S. 137, 142.

The Constitution of Massachusetts (Pt. II., c. I., Art. IV.) grants to the General Court full power and authority "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." The power thus granted and defined has long been recognized as the police power.

Commonwealth *v.* Alger, 7 Cush. 53, 85.

Commonwealth *v.* Danziger, 176 Mass. 290, 291.

In Commonwealth *v.* Alger, Shaw, C.J., said:—

"We think it is a settled principle, growing out of the nature of well ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In that case the defendant was the owner in fee to low water mark of certain lands bordering upon Boston harbor, subject, however, to the public rights of navigation and fishing. The establishment of a harbor line

by the Commonwealth, by which the defendant was forbidden to build a wharf beyond that line and to the full extent of his ownership, was sustained solely under the police power. This general principle was laid down as governing the application of that power: —

> "Whenever there is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." (Page 95.)

This principle extends to all cases where property is charged with a public interest. The police power is the power which is employed to define with precision the extent of that interest and to regulate the conflicting rights and duties of the individual and the public.

Rate Regulation an Exercise of Police Power.

It is precisely this principle that is applied in the regulation of the rates to be established by persons engaged in a business which is held to be charged with a public interest. Upon such persons the duty is imposed of conducting their business and the property devoted to it so as not to impose upon the public which they serve an unreasonable burden for their service. This common-law duty to make only reasonable charges being established, resort must be had to the police power whenever it is desired more clearly to define what charge is reasonable or to establish a method for readily determining that question.

Thus when, in Munn *v.* Illinois, 94 U. S. 113, this court had before it the question of the validity of a state statute fixing maximum charges for the storage of grain, that court at once recognized that it was

dealing with the limits of the police power of the states. It approached the question precisely as did Chief Justice Shaw in Commonwealth *v.* Alger, referring even to the same passages from Lord Hale. In general definition of the power, the court said: —

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and w

think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." (Page 124.)

It was pointed out that the police power may be thus exercised to regulate rates and charges only in the case of a business or calling which is charged with a public interest. Thus it was recognized to be applicable to the regulation of the rates of common carriers and was held to apply to the similar regulation of public warehousemen.

Since this case and the companion cases in the same volume relating to the regulation of railroad rates, it has never been doubted that it was within the power of the States to fix reasonable rates to be charged by common carriers for purely intrastate service. It has seldom since been necessary to state the precise source of that power. The court has been rather concerned with the manner of its exercise. It has, however, in no way modified the fundamental reasoning of Munn *v.* Illinois, and has frequently recognized that, in cases of this character, it was merely dealing with the limits of the police powers of the states.

Budd *v.* New York, 143 U. S. 517.
Minnesota Rate Cases, 230 U. S. 352.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Atchison, Topeka & Santa Fé Ry. Co. *v.* Vosberg, 238 U. S. 56, 59.
Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 578, 579.
Union Dry Goods Co. *v.* Georgia Public Service Corp., 248 U. S. 372, 375.

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Proviso
iscussed.

The language of the proviso of the Joint Resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the states show the breadth of that reservation. Neither "the transmission of Government communications" nor the "issue of stocks and bonds" is a matter that would be ordinarily affected by regulation in the interest of the public health, safety or morals. In fact, the chief if not the only ground for the regulation of the issue of stocks and bonds by carriers or other public service corporations is the close connection between such issues and the rates to be charged by these corporations for their service to the public. Such rates may in general be charged as will give a fair return on invested capital. States attempt to control the issue of stocks and bonds largely to make sure that those issues fairly represent property actually and properly invested in the business, in order to protect the public from paying rates based upon improper investments or an inflated capital.

Thus, the control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless. Its inclusion in the resolution plainly shows that these words were intentionally used in their broad sense and included the regulation of telegraph and telephone rates to the extent that the states already possessed such power.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear

that, to the extent that the public is to be permitted to use them as before, the regulative powers of the states should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government messages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

History of Language of Proviso.

The history of the Joint Resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion. The resolution appears to have been introduced in Congress in precisely the same form in which it was enacted. Various attempts were made to amend it in the Senate, but they were unsuccessful. It is the previous history of the language of the proviso that is important. This language was taken, with only one change made necessary by the different subject matter of the resolution, from the statute approved March 21, 1918, for the operation of the railroad systems under Federal control. (U. S. Stats., Second Session, 65th Congress, Part I., c. 25.) Section 15 of that act is as follows: —

Taken from Railroad Control Act.

"That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

As the Joint Resolution and this statute are dealing with problems of precisely the same character, namely, the manner of operation under Federal control of great systems of communication, previously subject

in part to state regulation, it is obvious that the language of the proviso and of this section must be regarded as having been used with precisely the same meaning. The history of section 15 of the Railroad Control Act is in fact the history of the proviso of the Joint Resolution.

History of that Act.

No portion of section 15 was contained in the bill as originally drafted. Subsequently in the House, the following clause was inserted: "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws of the States in relation to taxation." The same words were inserted in the Senate bill on February 21, 1918, by amendment. (56 Cong. Rec., p. 2445.)

On February 28, 1918, the following amendment, inserted at the end of the clause just quoted, was accepted by the committee and agreed to by the House: —

> "or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds." (56 Cong. Rec., p. 2820.)

It was later authoritatively stated on the floor of the House by Chairman Sims, of the committee having the bill in charge, that these words "have reference to the police powers of the states." (56 Cong. Rec., p. 3498.)

It is plain that if that section had been finally adopted in this form no claim could be made that the powers of the states to regulate railroad rates had been

reserved to them. It would be clear from the language of the exception that any police regulations affecting the control of rates would have been excepted from the reservation.

The insertion of this exception relating to the regulation of rates clearly establishes that the broad term "the lawful police regulations of the several states", as used in this clause, was regarded as including all matters of rate regulation within the power of the states. The insertion of the exception is conclusive upon this point.

It is obvious, however, that if the bill had been left in this form, the reservation to the states of the power to enforce police regulations would have been a mere shadow, for the subjects excepted embrace the most important of the powers exercised over railroads by the states under their police powers. Recognizing this and with the obvious intention of permitting far less interference with the rights of the states, the words "the regulation of rates, the expenditures of revenues, the addition to or improvement of properties" were struck out as a result of a conference between committees of the Senate and of the House in the final stages of the bill. (56 Cong. Rec., pp. 3241, 3420, 3435, 3443, 3500.) The only conclusion which can be drawn from this action is that the extent of the reservation of powers to the states was carefully considered at the final stages of this bill and that, by this amendment, a clear intention was expressed to reserve to the states, to some extent at least, their powers of rate regulation.

Conclusion from History.

When there came before Congress the matter of providing for the extension of Federal control from the railroads to the telegraph and telephone systems, it

was but natural that the same general policy with relation to the preservation of the powers of the states should be adopted. Thus Congress turned to the provision which it had carefully worked out but four months before with reference to the railroads. It adopted that provision without change and it must be said to have adopted it with a full appreciation of the meaning so plainly given to it by its history.

Of course, the railroad control act contained more detailed machinery than the Joint Resolution for dealing with the matter of rates, but it contained no provision in any wise inconsistent with section 15 as above interpreted. Even though some of the provisions of that act might be thought somewhat to modify section 15, no such modification can be found in the Joint Resolution under consideration. In that resolution there is no provision whatever, other than that under consideration, having the remotest bearing upon the matter of rate regulation. The proviso must therefore be given its full meaning as disclosed by its plain language read in the light of the history of that language.

Conclusion. Accordingly, the Public Service Commission of Massachusetts submits that the Joint Resolution of Congress, under which the telephone system of the respondent was taken over by the Federal Government and under which it is now being operated, must be interpreted as expressly reserving to that state the same powers with reference to the regulation of the rates to be charged for communication between points within it upon the system of the respondent that it had before the period of Federal control.

III.

This Suit is not beyond the Jurisdiction of the Massachusetts Court on the Ground that the United States is a Necessary Party or that the Suit is in Effect against the United States.

This proceeding is not a suit against the President or against the Postmaster-General. No process or injunction is sought against either. There is no occasion to determine whether it would be within the power of the court to enjoin the Postmaster-General, if he were found within the State, from disobeying the order of the Public Service Commission in violation of the limitations on his authority imposed by the Joint Resolution.

Here the suit is directed, and an injunction is sought, merely against a corporation which, until July 31, 1918, was admittedly subject to all the processes of the state court, but which is now acting as an instrumentality of the Federal Government. Doubtless, to the extent that it is acting in accordance with valid Federal authority, and to the extent that it is obeying the valid orders of the Postmaster-General, it cannot be restrained by any court. But it can derive no protection from an order, either of the President or the Postmaster-General, which is in violation of their authority under the Joint Resolution. The respondent is bound by no duty to disobey the Act of Congress merely because the Postmaster-General so directs.

The question of the extent of the exemption of

Federal agencies from state interference has been frequently considered by this court.

State Power over Federal Agencies.

In National Bank *v.* Commonwealth, 9 Wall. 353, in sustaining the right of a State to require a national bank to pay, in the first instance and on account of its shareholders, a tax assessed upon its shares (*Cf.* St. 1909, c. 490, pt. III., §§ 11–13) the court, at pages 361, 362, said: —

> "The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency, in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

Similar questions have arisen with reference to the jurisdiction of states over railroads incorporated by Act of Congress, especially in the case of the Union Pacific Railroad, which was, by an act approved July 1, 1862, in the midst of the Civil War, created for the purpose, frequently reiterated in that act, "of aiding in the construction of said railroad and telegraph line, and to secure a safe and speedy transportation of the mails, troops, munitions of war and the public stores thereon."

In Railroad Company *v.* Peniston, 18 Wall. 5, it was recognized that the Union Pacific Railroad was an agent of the Federal government and that Congress might interpose to protect it from state taxation. In the absence of such action it was held that a tax upon its property was valid.

In Union Pacific Railway Company *v.* Burlington & Missouri River Railroad Company, 3 Fed. 106, the power of the states to regulate the crossing and connection of railroads, and in Union Pacific Railway Company *v.* Leavenworth N. & S. R. Co., 29 Fed. 728, the power of eminent domain of the states, were held applicable to this Federal corporate agency.

In Smyth *v.* Ames, 169 U. S. 466, it was contended that the Union Pacific Railroad was not within the reach of the rate regulating power of any state by reason of the provisions of the Act of Congress of July 1, 1862, creating it. The court made the following answer to this contention (p. 521): —

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to

Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

A similar result had previously been reached as to another railroad of Federal incorporation in Reagan *v.* Mercantile Trust Co., 154 U. S. 413.

In none of these cases is there the least suggestion, even from the parties seeking to impeach the rights of the states to tax or to regulate, that those powers when once conceded to the states by Congress could not be enforced by all valid legal processes against these corporate governmental agencies.

Jurisdiction over Officers acting illegally.

An officer of an agent of the United States is not protected from the legal consequences of his acts or from judicial processes establishing those consequences, even by the fact that he is acting under the color of an express order of the President. If that order for any reason is invalid, the officer may be held liable to pay the damages caused by his act.

Little *v.* Barreme, 2 Cranch, 170.
Belknap *v.* Schild, 161 U. S. 18.

Possession of real property held by him in behalf of the United States and in assertion of its authority may be taken from him by ejectment proceedings.

United States *v.* Lee, 106 U. S. 196.
Tindal *v.* Wesley, 167 U. S. 204.

And the injunctive processes of a court of equity may be employed to restrain him from acting in violation or excess of his authority.

Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620.
School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94.
Noble *v.* Union River Logging Railroad Co., 147 U. S. 164.

In Philadelphia Co. *v.* Stimson, although an injunction was sought against the respondent as Secretary of War, the court thus put one side the question of its jurisdiction over him: —

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. Little *v.* Barreme, 2 Cranch, 170; United States *v.* Lee, 106 U. S. 196, 220, 221; Belknap *v.* Schild, 161 U. S. 10, 18; Tindal *v.* Wesley, 167 U. S. 204; Scranton *v.* Wheeler, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. Osborn *v.* Bank of United States, 9 Wheat. 738, 843, 868; Davis *v.* Gray, 16 Wall. 203; Pennoyer *v.* McConnaughy, 140

U. S. 1, 10; Scott *v.* Donald, 165 U. S. 107, 112; Smyth *v.* Ames, 169 U. S. 466; *Ex parte* Young, 209 U. S. 123, 159, 160; Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146; Herndon *v.* C., R. I. & P. Ry. Co., 218 U. S. 135, 155; Hopkins *v.* Clemson College, 221 U. S. 636, 643–645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. Noble *v.* Union River Logging R.R. Co., 147 U. S. 165, 171, 172; School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94."

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In this case the court made plain that this principle is not restricted to cases where the officer is acting under an invalid statute, but held that it applies in all cases where he is assuming to exercise a power which is in excess of the authority granted to him. At page 621 the court said:

"Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte* Young, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

As against state officers, the principle under discussion has been frequently recognized by this court in sustaining the jurisdiction of the Federal courts to enjoin such officers from acting under the authority of unconstitutional state statutes.

Smyth *v.* Ames, 169 U. S. 466.
Ex parte Young, 209 U. S. 123.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499, 506.
Cavanaugh *v.* Looney, 248 U. S. 453, 456.

Similarly, those courts will enjoin acts in violation of the Federal Constitution done by state officers in ostensible enforcement of valid state statutes, on the ground that such acts are in excess of the officers' authority and thus not the acts of the state; that is, they will enjoin the unconstitutional administration by state officials of valid state statutes.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362.
Raymond *v.* Chicago Traction Co., 207 U. S. 20.
Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499.

Analogy to Illegal Tax Cases.

The case at bar is closely analogous to these two groups of cases. In those cases, though no suit could be brought against the state, jurisdiction is assumed to restrain a public officer from collecting taxes for the

benefit of the state, when the authority under which he is purporting to act is either invalid or does not warrant his attempted action. In the case at bar the claim is that an instrumentality of the United States is attempting to collect telephone rates from citizens of Massachusetts in violation of the express terms of its authority to act for the United States. In both classes of cases the officer or governmental instrumentality is purporting to act solely for the benefit of the government which he represents. An injunction has the effect of depriving that government of money which it would otherwise receive. After it has actually received it, there is obviously no remedy in the absence of its consent to be sued. But the cases relied upon plainly recognize jurisdiction to prevent public officers or instrumentalities from exacting from the public illegal payments, even though all sums collected are to go into the public treasury.

Cases relied upon by State Court distinguished.

The cases relied upon by the court below come within an entirely different class. Most of them, including the various cases against the Secretary of the Interior, involve the title to land whose ownership is claimed by the United States. Others, like Belknap *v.* Schild, 161 U. S. 10, and International Postal Supply Co. *v.* Bruce, 194 U. S. 601, involve the right to use property owned by the United States. In such cases, to issue an injunction restraining use of the property by a public officer would be in effect to enjoin the United States from using its own property. Wells *v.* Roper, 246 U. S. 335, was an attempt to enforce specific performance of a contract of the United States by a bill to restrain a public officer from cancelling it. To grant this relief would have been in effect to require

the United States to perform its contract. The case of Louisiana *v.* McAdoo, 234 U. S. 627, was an attempt to review the official acts of the Secretary of the Treasury in the enforcement of the customs laws. No one of these cases is in any way comparable to the tax cases above referred to or to the case at bar. In no one of them was there any claim that a public officer was threatening to require the complainant to make payments into the public treasury which were in violation of law.

Conclusion.

The Joint Resolution, interpreted as reserving to the states the power to regulate rates, is in effect a direction by Congress to every Federal officer connected with the operation of the telephone systems and to every instrumentality, corporate or otherwise, employed in that operation, to obey all valid assertions of that power by state authorities. The failure of the respondent as a Federal agency to conform to that direction of Congress is plainly an act in excess of the authority granted it by the Federal government. It is not protected by its abuse of power even by the orders of the Postmaster-General. He, too, would be equally within the reach of the injunction of the state court, if he was personally within its territorial jurisdiction.

If the Joint Resolution or the action of the President under it were unconstitutional, it would plainly follow that the present proceeding would not be a suit against the United States. In that event it would unquestionably be within the jurisdiction of the state court to restrain the respondent from the commission of an illegal act. It can be none the less so, when the ground of the suit is not that Congress has attempted and

failed to grant the authority relied upon, but that it has expressly withheld it.

Accordingly, it is submitted that it was within the power of Massachusetts court by proper decree and process to require the respondent, even as a Federal instrumentality to obey all valid orders of the Public Service Commission directed against it.

IV.

The Public Service Commission is authorized by Existing Statutes of the Commonwealth to enforce the Power reserved to the States by the Joint Resolution.

If the three foregoing propositions are decided by this court in favor of the petitioners, the jurisdiction of the court below to determine this case is established so far as any Federal question is concerned. The decree of dismissal must be reversed.

One further question must be determined before a decree requiring the respondent to obey the order of the Public Service Commission can be entered, namely, whether the existing statutes of Massachusetts with reference to the regulation of telephone rates apply to a corporation in the situation in which this respondent now finds itself. Upon this point the court below has expressed no opinion, since it dismissed the suit for want of jurisdiction before reaching that question. It would seem that this was purely a local matter to be determined by the Massachusetts court after its jurisdiction has been established by a decision by this court of the Federal questions involved. There would seem

to be no question, however, but that these statutes will be held applicable to the respondent under existing conditions.

The Public Service Act (St. 1913, c. 784, § 2) establishes the authority of the Commission in part as follows: —

"SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

Sections 20, 21 and 22 (see Appendix, pp. 39–42), dealing with the regulation of rates for service, apply to "every common carrier" (§ 20) as defined in section 2.

Plainly, the respondent is furnishing and rendering "for public use within the commonwealth" the service described in section 2 (*c*). It is, therefore, a common carrier as defined in section 2, and thus brought within the jurisdiction of the Commission.

To be sure, it is now rendering that service solely

as an instrumentality of the Federal Government, but it is still a corporation within the jurisdiction of the Commonwealth. It is still within the power of the Commonwealth, by the express terms of the Joint Resolution, to tax the respondent under Mass. St. 1909, c. 490, pt. III., §§ 40–43. Without permission of the Federal Government, doubtless this could not be done. But there is no question but that taxes may be imposed upon such corporate instrumentalities by the states when Congress so authorizes. Such an authority of limited scope has long been in existence as to national banks.

U. S. Rev. Stat., § 5219.
Van Allen *v.* Assessors, 3 Wall. 573.
Mercantile Bank *v.* New York, 121 U. S. 138.
Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 667.
Bank of California *v.* Richardson, 248 U. S. 476, 483.

Therefore, construing the Joint Resolution as reserving to the States the power to regulate intrastate rates, and as the provisions of the Public Service Act are plainly applicable to every corporation furnishing telephone service for the public within the Commonwealth under any circumstance, those provisions must be held applicable to the respondent, even though it is a government instrumentality. This statute would still in terms apply to the respondent without the reservation in the Joint Resolution, but doubtless in that case it could not be enforced against it while such an instrumentality. If Congress has consented that there

shall be no immunity from state regulation on this ground, the plain terms of the statute necessarily apply.

Then the reservation in the resolution is not merely of the police *powers* of the states. In such a form it might be argued that it called for definite exercise of those powers directly against this government instrumentality. The resolution provided "that nothing in this Act shall be construed to amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States." This is a definite declaration that all lawful police regulations then in force or thereafter to be enacted shall not be affected by the action of the President under the authority given him by the resolution. It plainly indicates an intention both to leave in full force *existing police regulations* and also to subject these systems in the Federal control to any future regulation that may be validly enacted.

It is submitted that it cannot be successfully contended that the respondent in its present status does not come within the reach of the powers granted to the Public Service Commission by the Public Service Act.

V.

Conclusion.

Accordingly, the Public Service Commission of Massachusetts contends that the decree of the Supreme Judicial Court, dismissing the petition for want of jurisdiction, should be reversed and that that court should be directed to proceed to the enforcement of the order of the Public Service Commission in question in the same manner and to the same extent as it is authorized

to enforce such an order directed to a telephone company not subject to Federal control or not acting as a Federal instrumentality.

Respectfully submitted,

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WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

APPENDIX.

Mass. St. 1913, c. 784 (The Public Service Act), provides: —

SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

. . . . . .

SECTION 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the

commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be given prior to the time fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and

filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: *provided, however*, that when any such contract or contracts are or become terminable by notice, the commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

SECTION 21. Whenever the commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and after notice, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. Pending any such investigation and the decision thereon, the commission shall have power, by any order served upon the common carrier affected, to suspend the taking effect of such change or changes, but not for a longer period than six months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, the commission may make such order in reference to any new rate, joint rate, fare, telephone rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, as would be proper in a proceeding initiated after the same has taken effect. At any such hearing involving any proposed increase in any rate, joint rate, fare, telephone rental, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the

common carrier. If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the commission that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the commission shall have power to determine what will be the just and reasonable rate or rates, fare or fares, telephone rental or rentals, toll or tolls, charge or charges, to be thereafter observed in such case as the minimum to be charged, and to make an order that the common carrier complained of shall not thereafter demand, charge or collect any rate, fare, telephone rental, toll, or charge lower than the minimum so prescribed without first obtaining the consent of the commission, not to be given without a public hearing.

SECTION 22. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges or any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers,

agents and employees. The commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the commission such authorization is consistent with the public interests, and the commission may from time to time modify or revoke such authorization.

. . . . . .

SECTION 27. The supreme judicial court shall have jurisdiction in equity to review, annul, modify or amend any rulings or orders of the commission which are unlawful to the extent only of such unlawfulness. The procedure before the said court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the commission to show that its order is invalid. Any proceeding in any court of this commonwealth directly affecting an order of the commission or to which the commission is a party shall have preference over all other civil proceedings pending in such court, except election cases.

SECTION 28. The supreme judicial court shall have jurisdiction upon the application of the commission to enforce all valid orders of the commission and all the provisions of this act. Whenever the commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law

or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of the law or of any order of the commission, it shall direct counsel to the commission to begin, subject to the supervision of the attorney-general, an action or proceeding in the supreme judicial court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

Joint Resolution of Congress of July 16, 1918.

To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *provided,* That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-

five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: *provided, further,* That *nothing in this Act shall be construed to amend, repeal, impair, or affect* existing laws or powers of the States in relation to taxation or *the lawful police regulations of the several States,* except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.